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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 26–29) is reported at 210 F. Supp. 773. The opinions of the panel of the court of appeals (R. 35–52) are reported at 321 F. 2d 14. The opinion of the court of appeals, sitting *en banc* (R. 68–69), is reported at 325 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on January 13, 1964 (R. 70). The petition for a writ of certiorari was granted on June 1, 1964. 377 U.S. 951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, prior to service of process on the taxpayer in an action to collect taxes, the district court has the power to issue an injunction *pendente lite* prohibiting third parties within the jurisdiction from disposing of the taxpayer's property, even though such property is represented by a deposit payable outside the jurisdiction.

2. Whether a taxpayer's bank deposit in a foreign branch of a New York bank, collectible in New York if payment is refused at the branch, is subject to tax lien foreclosure in the district of the home office.

STATUTES AND REGULATIONS INVOLVED

Sections 6321, 7402(a) and 7403(a) of the Internal Revenue Code of 1954, Section 1655 of 28 U.S.C., Sections 302 and 313 of the New York Civil Practice Law and Rules, and Sections 301.6332–1(a) and 301.7401–1 of Treasury Regulations on Procedure and Administration (1954 Code), are set forth in the Appendix, pp. 38–43, *infra*.

STATEMENT

Omar, S.A., is a Uruguayan corporation (R. 3). On October 31, 1962, the Commissioner of Internal Revenue made jeopardy assessments against Omar, totalling approximately $19,300,000. The assessments were on account of corporate income tax liabilities, plus interest and penalties, found to have been incurred but unpaid with respect to income realized by Omar from sources within the United States, during its fiscal years March 31, 1955, through March

31, 1961 (R.4–6).[1] On the same day, the First National City Bank (respondent) was served with notice of levy and notice of the federal tax lien (R. 23).

Concurrently, the United States commenced an action in the United States District Court for the Southern District of New York naming, as defendants, Omar, S.A., Lazard Freres and Company, Lehman Brothers, Belgian-American Banking Corp., Belgian-American Bank & Trust Company, First National City Trust Company, and respondent (R. 3–4). The complaint alleged, *inter alia,* that respondent held "substantial sums of money for, for the account, or to the credit of, Omar * * *" (R. 7). Personal jurisdiction over respondent was acquired by service of process (R. 2, 28), but Omar has not yet been served.

The complaint requested that the district court determine that Omar was indebted to the United States for taxes, interest and penalties in the amount of the assessment; that the court foreclose the tax lien of the United States upon all of Omar's property and rights to property, including sums held for the account or credit of Omar in foreign branch offices of the defendant banks; and that it grant such "further relief that it deems is just, equitable and

[1] Omar failed to pay these assessments (R. 4–6). On May 20, 1963, Omar petitioned the Tax Court for a redetermination of these deficiencies. Docket No. 2041–63. No decision has been rendered in that proceeding. Since a jeopardy assessment is involved here, collection is authorized despite the pendency of Tax Court proceedings. See Section 6213(a), Internal Revenue Code of 1954.

proper." The complaint also requested that, pending the determination of the action, the court enjoin the defendants from transferring any property or rights to property held for the account of Omar (R. 7–8).

Affidavits by several internal revenue agents were filed in support of the application for injunctive relief. They show the following facts:

The possible tax delinquency first came to the attention of the Internal Revenue Service in 1959, when Omar filed its first and only tax return, which claimed a refund of tax previously withheld at the source (R. 13, 16). Because the return was incomplete, additional information concerning the corporation was requested (R. 13–16). The internal revenue agent conducting the examination also informed Omar that he proposed to make a determination of Omar's tax liability on the basis of information at hand (R. 13–14).

The Service later learned that in June 1961 a director of Omar came to the United States and commenced to liquidate Omar's assets in the United States (R. 14). The records of Lehman Brothers, a brokerage house of which Omar was a customer, disclose that in December 1961, Omar withdrew $500,000 from its account there. A notation opposite the withdrawal states: "Check to 1st National City Bank" (R. 19). The records of Lazard Freres & Company, another brokerage house which held securities for Omar, reveal that in the same month $1,640,000 was paid to Omar with the notation: "Transfer by wire to 1st National City Bank of n y [sic] Montevideo credit for your acct" (R. 18). In the same year $400,000

was transferred from Omar's Lazard Freres account to the Montevideo branch of the Belgian-American Banking Corporation (another of the original defendants) for the account of Omar (R. 17), and $800,000 was transferred from Omar's account with Abraham & Company, another New York brokerage house, to the same Montevideo account (R. 18). There was other evidence that Omar was removing its assets from the United States (R. 14–16).

On October 31, 1962, the district court, per Dawson, J., issued a temporary restraining order (R. 9–10, 26) and, after a hearing, filed an opinion (R. 26–29) which found in part (R. 27):

> The affidavits of the plaintiff show an intent to liquidate, and in fact, substantial liquidations of the defendant Omar's accounts within the United States and transfer of the proceeds outside of the territorial jurisdiction have occurred. It therefore appears that there is a clear and present danger that plaintiff may be unable to recover upon defendant Omar's tax liability.

Accordingly, on the basis of its "personal jurisdiction over the officers of the bank within the United States" (R. 28), the district court concluded that it should exercise its "equitable power to issue a preliminary injunction so as to prevent irreparable injury pending the determination of an action" (R. 27).[2] It thereupon ordered (R. 31):

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[2] The district court excluded First National City Trust Company and Belgian-American Bank & Trust Company from the injunction, on the basis of a satisfactory showing that neither they nor their branches or agents held any of Omar's assets (R. 21–22, 25, 28–29). Respondent, in opposing the motion for a preliminary injunction, filed an affidavit by one of its vice-

> that pending the determination of this action or until further order of this Court, the defendants, * * * First National City Bank of New York *, * * be and they are hereby restrained from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A., * * * now held for or for the account of the said Omar, S.A., by them or by any of their branches, agents, or nominees whether located within the United States or not and whether their branches, agents, or nominees are located within the United States or not.

The court's opinion observed that if compliance with the injunction were shown to violate foreign law, the injunction would be modified (R. 28).

Respondent forthwith appealed from the issuance of the preliminary injunction (R. 32). A three-judge panel of the court of appeals voted to reverse the district court, Circuit Judge Hays dissenting (R. 35–52). The majority reasoned that since the district court did not yet have personal jurisdiction over Omar, it could proceed only with reference to such of Omar's property as was located within its jurisdiction (R. 40, 47). The court concluded that deposits held by respondent which were "collectible [by Omar] only outside the United States" (R. 49) were

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presidents which affirmatively stated that Omar was not a depositor of the bank at its head office or any domestic branch, but neither affirmed nor denied that Omar was a depositor at any of the bank's foreign branches (R. 23–24). The location and other details of Omar's foreign branch accounts, if they exist, now await further clarification in the district court, pending disposition by this Court of this proceeding.

not property within the jurisdiction of the district court. This followed, said the court, because the rights of the United States, by virtue of its tax lien, were no greater than Omar's rights, and Omar could not have brought suit in New York to collect deposits payable abroad unless it had demanded and been refused payment at the counters of the foreign branch (R. 40–46). On rehearing *en banc*, the court of appeals reversed the district court by a vote of 4-to-3 (R. 68–69).[3] The court of appeals stayed its mandate pending filing of the petition for certiorari. The petition was granted on June 1, 1964 (377 U.S. 951).

Since the decision below, the Treasury has promulgated regulations limiting the Commissioner's authority to levy on deposits in foreign branches of banks doing business in the United States (see Appendix, pp. 41–43, *infra*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Because of the serious effect which the decision of the court of appeals would have upon efforts to collect delinquent taxes from nonresident alien taxpayers deriving income from United States sources (as well as from American citizens residing abroad), the United States petitioned in this case for a writ of certiorari. As we pointed out in the petition (pp. 7–8), such persons "not infrequently frustrate col-

[3] Judge Kaufman did not participate in the rehearing. Judge Clark died after argument but before announcement of the decision. It was noted that he had indicated his intention to vote for affirmance of the district court. An equal division would have resulted in affirmance. *Farrand Optical Co.* v. *United States*, 317 F. 2d 875, 885–886 (C.A. 2).

lection of the taxes which they have incurred by liquidating their American assets and transferring the proceeds to foreign branches" of domestic financial institutions. The injunction here under review would freeze such funds before they are paid to the taxpayer abroad so as to make them available for payment of delinquent taxes.

1. We contend, first, that the district court's order enjoining respondent "from selling, transferring, pledging, encumbering, disposing of, or distributing any property or rights to property of Omar, S.A. * * * now held for or for the account of the said Omar, S.A., by [respondent] or by any of [its] branches, agents, or nominees whether located within the United States or not * * *" (R. 31) was a proper *in personam* order to a party over whom personal jurisdiction had been obtained, irrespective of the "situs" of respondent's obligation to Omar. The claim, in brief, is that the district court had discretion to grant temporary relief in order to preserve the Uruguayan account[4] while the government was seeking to obtain personal jurisdiction over Omar and compel the latter to make the funds available for payment of its tax obligation. The power of a district court to act *pendente lite* in this

[4] Although respondent's brief in opposition indicates, on the basis of a letter from taxpayer's counsel, that taxpayer's only account is at Montevideo (Br. in Op., p. 5), the extent and whereabouts of deposits with respondent payable directly or beneficially to Omar is a proper subject of proof in the district court. Litigation of this fact question in a plenary proceeding has so far been precluded by respondent's appeal from the temporary injunction.

manner derives from established principles of equity as well as from Section 7402 of the Internal Revenue Code of 1954. Neither the circumstance that Omar, the principal defendant, has not yet been served, nor the fact that respondent's debt to the taxpayer is payable, in the first instance, in Montevideo, affects the jurisdiction of the district court. Service on Omar can be made under a recent provision of the New York Civil Practice Law and Rules, and temporary relief is warranted until such service can be obtained. And since respondent has actual control over its Montevideo branch—which is an arm of respondent's single federally chartered corporation—New York's "separate entity" doctrine does not prevent the issuance of the injunction. Nor is there any policy reason to deny relief. No severe hardship is imposed on the bank nor is it made less attractive to potential depositors if such limited relief is granted in a narrowly defined group of cases.

2. Alternatively, we contend that the court of appeals erred in concluding that the New York "separate entity" concept of branch banking fixed the situs of respondent's obligation to Omar in Montevideo for federal tax-collection purposes. We submit that for these purposes the obligation to Omar has its situs at respondent's main office. Under the statute governing venue in tax lien foreclosure actions, the debt constitutes property "within the district" even though it is payable, in the first instance, in Montevideo. The local "separate entity" principle is inapplicable in a federal tax lien foreclosure action such as this one because this taxpayer actually has

the power to make the funds payable within the United States and should not, merely by its refusal to exercise this power, be able to frustrate the collection of a lawful obligation.

3. No policy reasons stand in the way of the enforcement of an appropriate order such as the one issued by the district court. The threat of multiple liability is insubstantial and premature; the bank's claim of hardship is unreal and, on closer analysis, totally without substance. This is particularly true in light of the recent Treasury Regulation which limits the power of the Commissioner to employ administrative sanctions or to apply for injunctive relief with respect to deposits in foreign branches to the case where the taxpayer is already subject to United States jurisdiction or has transferred a deposit from the United States to a foreign branch to hinder or defeat collection of federal taxes.

ARGUMENT

I

THE DISTRICT COURT HAD AUTHORITY TO ENJOIN RESPONDENT, OVER WHOM IT HAD PERSONAL JURISDICTION, FROM PARTICIPATING IN THE DISSIPATION OF ASSETS BELONGING TO AN ABSENT TAXPAYER PENDING THE SERVICE OF VALID PROCESS UPON THE TAXPAYER

Our first contention assumes for purposes of argument that respondent's debt to Omar,[5] evidenced by a deposit originating in respondent's United States

[5] Cf. Lamb, *Group Banking*, p. 46: "Deposits are received in all areas served by the branches and these combined liabilities become the debt of the parent institution."

main office, and now carried on the books of its Montevideo branch and payable there in the first instance, does not have a situs within the United States. Accepting this proposition, *arguendo*, it may be that no action *quasi in rem* could be maintained in the Southern District of New York with respect to this debt. This would not, however, leave the government without a remedy. If personal jurisdiction were obtained over Omar, that corporation could be ordered to transfer the funds on deposit in Montevideo to the government. *United States* v. *Ross*, 302 F. 2d 831 (C.A. 2); see *Massie* v. *Watts*, 6 Cranch 148; *Phelps* v. *McDonald*, 99 U.S. 298, 307–308.[6] Consequently, even on the above hypothesis, this Court should approve the action of the district court in entering a temporary injunction against respondent—a party over whom it had personal jurisdiction—whereby respondent was directed to preserve the very fund which could be transferred to the United States by court order if and when personal jurisdiction were obtained over Omar. We stress that this injunction was not equivalent to garnish-

[6] This order can be made effective without imposing sanctions for contempt. The district court, acting under Rule 70 of the Federal Rules of Civil Procedure, could order a person appointed by the court to transfer the right to the deposits to the United States. The United States could then demand payment abroad, and, if payment were refused, could collect by suit in the United States. See *Sokoloff* v. *National City Bank*, 130 Misc. 66, 224 N.Y.S. 102, affirmed, 223 App. Div. 754, 227 N.Y.S. 907, affirmed, 250 N.Y. 69, 164 N.E. 745; cf. *Corbett* v. *Nutt*, 10 Wall. 464; *Watkins* v. *Holman*, 16 Pet. 25; *Roller* v. *Murray*, 234 U.S. 738.

ment, seizure, or attachment. It was merely an order preserving an asset which a named defendent—not yet before the court—might be compelled by court decree to transfer to the United States. The validity of such an order is supported by the terms of the governing statute and by traditional principles of equity. The court's power to enter it was not affected by the circumstances that Omar—against whom the order did not run—had not been served, and that the deposit was, under New York law, payable in the first instance outside the United States. The validity of the order did not turn, as the court of appeals erroneously believed, on "whether [respondent] holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court" (R. 39). For the district court's jurisdiction to enter the order depended not on the situs of the debt but on respondent's presence before the court.

A. THE TEMPORARY INJUNCTION WAS AUTHORIZED BY STATUTE AND BY ESTABLISHED PRINCIPLES OF EQUITY

Section 7402(a) of the Internal Revenue Code of 1954 (p. 38, *infra*) provides as follows:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction * * * as may be necessary or appropriate for the enforcement of the internal revenue laws. * * *

The order entered by the district court in this case was patently "necessary or appropriate for the enforcement of the internal revenue laws." According to the affidavits before the court (R. 13–20), Omar

had embarked on a calculated program to frustrate the enforcement of the tax laws by removing its assets from the United States. This collection action was instituted pursuant to jeopardy assessments in order to reach, *inter alia,* the very funds which Omar had transferred to its account at respondent's Montevideo branch. If a temporary injunction of the sort involved here could not be issued, the funds payable in Montevideo might well be dissipated by the time service on Omar could be obtained. Hence the order was both "necessary" and "appropriate" for the effective enforcement of the internal revenue laws against Omar.

In addition, the order was consistent with established equity practice. It has long been settled that equity will act "to preserve the property from destruction pending legal proceedings for the determination of the title." *Erhardt* v. *Boaro,* 113 U.S. 537, 539. Although the classic application of this doctrine is in real property cases, when equitable relief is sought to maintain the status quo while the legal issue of title is being litigated, the principle is fully applicable to other disputes, including tax collection cases such as this one.

In *Deckert* v. *Independence Shares Corp.,* 311 U.S. 282, a bill in equity was brought against an insolvent and allegedly fraudulent vendor of securities and against a third party possessing assets belonging to the vendor. By way of interlocutory relief, plaintiffs sought the appointment of a receiver to administer the assets of the vendor and an injunction against the vendor's debtor. This Court sustained the issu-

ance of a preliminary injunction restraining the vendor's debtor from transferring or disposing of any of the assets owing to the vendor, in order that the plaintiff's remedy might not be frustrated. It said that "the injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill." 311 U.S. at 290.

In *DeBeers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212, a temporary injunction was issued restraining nine foreign corporations, defendants in an antitrust action, from withdrawing any of their property from the United States pending the outcome of the litigation. The corporations challenged the court's jurisdiction over them and also attacked the injunction. This Court reversed the district court's order because no money judgment could have been entered in the antitrust suit; hence it concluded that the temporary injunction "deals with property which in no circumstances can be dealt with in any final injunction that may be entered." 325 U.S. at 220. In reaching this conclusion, the Court distinguished the *Deckert* case because it dealt with an injunction "with respect to a fund or property which would have been the subject of the provisions of any final decree in the cause." *Ibid.* In this regard the present case is analogous to *Deckert* and unlike *DeBeers.* If and when personal jurisdiction is obtained over Omar and the government prevails, the very funds which are "frozen" by the temporary injunction will be ordered transferred to the government. Consequently, the injunction in this case clearly deals with the same

property that may be affected by the final judgment.[1]

The present situation is admittedly different from that in *Deckert*, in two respects. First, in *Deckert* the primary obligor—*i.e.*, the party against whom the plaintiffs were seeking judgment—had been subjected to the jurisdiction of the court; in the present case Omar has not yet been served. Second, in *Deckert* there was no question as to the court's jurisdiction over the principal defendant's debtor; in the present case it could be contended that under New York's "separate entity" doctrine Omar's only debtor is respondent's Montevideo branch—an "entity" over which the court might be said to have no jurisdiction. We submit, for reasons stated below, that neither of these considerations warrants a different result in this case from that reached in *Deckert*.

B. THE INJUNCTION COULD ISSUE AGAINST RESPONDENT OVER WHOM THE COURT HAD PERSONAL JURISDICTION, NOTWITHSTANDING THE TAXPAYER'S ABSENCE

The fact that Omar has not yet been served is of no consequence in determining whether the injunction

[1] In *United States* v. *Morris & Essex R. Co.*, 135 F. 2d 711 (C.A. 2), certiorari denied, 320 U.S. 754, a temporary injunction restraining payment by a delinquent taxpayer's debtor to the taxpayer's shareholders was sustained. The Second Circuit, per Judge Learned Hand, first determined that the shareholders and the taxpayer were to be considered one and the same. It then satisfied itself that if certain steps were taken by the government, the tax debt could be collected from the money owed by the taxpayer's debtor. It concluded: "The path being therefore cleared for an action by the plaintiff as substitute obligee of the lessor's [taxpayer's] right of action against the lessee [debtor], the tax can be recovered in full, *and to that end the asset must be preserved meanwhile*.". 135 F. 2d at 713–714. (Emphasis added.)

issued against respondent is valid. This action commenced with the filing of a complaint, Rule 3, Federal Rules of Civil Procedure, and it "remains pending until dismissed by the court under Rule 41(b) for lack of due diligence in prosecution." *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. 2d 95, 99 (C.A. 2). In the interim, whether or not the principal defendant has been lawfully served, the district court has the power to preserve the status quo by issuing orders to other parties over whom it has jurisdiction. Respondent was named as a party and was duly served. It is subject to the court's jurisdiction and amenable to its orders.

The power to issue a temporary injunction against a party such as respondent pending service of process on the principal defendant is certainly no less than the court's power in an *in personam* proceeding to order attachment or garnishment of the assets of a defendant who has not yet been served. Prior to the recent amendments of the Federal Rules of Civil Procedure (see the amended Rule 4(e)), a federal district court could not obtain *quasi in rem* jurisdiction over a debt owed to an absent defendant even though the debtor was subject to the court's jurisdiction. *Big Vein Coal Co.* v. *Read*, 229 U.S. 31. Nonetheless, if a suit were instituted against a defendant over whom personal jurisdiction *could* be obtained within the district, writs of attachment or garnishment could issue to the defendant's debtors pending service of process on the defendant. *Jacobson* v.

Coon, 165 F. 2d 565 (C.A. 6); *Hearst* v. *Hearst*, 15 F.R.D. 258 (N.D. Cal.); but see *Interstate Cigar Co.* v. *Corral Wodiska y CA*, 30 F.R.D. 354 (E.D. N.Y.). So long as "it appears that jurisdiction in personam may be secured in due course" it has been held appropriate to grant such interlocutory relief as might be necessary "to secure the prospective judgment prior to the time that the defendant is personally served." *Hearst* v. *Hearst, supra,* at 260; see also *Georgia* v. *Brailsford*, 2 Dall. 402.[8]

Service of process on Omar "in due course" is highly probable. Under the recently enacted Section 302(a) of the New York Civil Practice Law and Rules, Omar may be subjected to the jurisdiction of the court with respect to "a cause of action arising from * * * any business [transacted] within the state" (p. 40, *infra*). Service of process may then be made outside the State under Section 313 of the New York Civil Practice Law and Rules, which allows service on the absent defendant by any person

[8] The fact that the order affects the rights of the yet-absent defendant by "freezing" its deposits in Montevideo is no bar to relief. In *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, this Court sustained the district court's power to transfer an action to another district under 28 U.S.C. 1406(a) even though service over defendants could not be had in the transferor district. See *United States* v. *Berkowitz*, 328 F. 2d 358 (C.A. 3), certiorari pending, No. 125, 1964 Term; *Koehring Co.* v. *Hyde Construction Co.*, 324 F. 2d 295 (C.A. 5) (transfer under 28 U.S.C. 1404(a) sustained notwithstanding absence of defendants). These instances obviously involved more serious effects upon the absent defendants than the "freezing" of funds in this case.

authorized to make service under the laws of New York or under the laws of the place where service is made or by an attorney in such place (pp. 40–41, *infra*). See *United States* v. *Montreal Trust Co.*, decided May 1, 1964, 13 A.F.T.R. 2d ¶ 64–705 (S.D. N.Y.); *Steele* v. *DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97; *Totero* v. *World Telegram Corp.*, 41 Misc. 2d 33, 245 N.Y.S. 2d 870; *Developers Sm. Bus. Inv. Corp.* v. *Puerto Rico Land & Devel. Corp.*, 246 N.Y.S. 2d 896.* In addition, personal jurisdiction over Omar may be obtained or reinforced if Omar makes a general appearance to defend this action on the merits—a course which it may take in order to protect other property over which the district court unquestionably has jurisdiction. Although there is a conflict of authority as to

* Section 302(a) did not become effective until September 1, 1963. However, as does its Illinois counterpart, the section applies to transactions occurring before its effective date. See, *e.g.*, *Steele* v. *DeLeeuw*, 40 Misc. 2d 807, 244 N.Y.S. 2d 97; *Patrick Ellam, Inc.* v. *Nieves*, 41 Misc. 2d 186, 245 N.Y.S. 2d 545; *William Rand, Inc.* v. *Joyas DeFantasia, S.A.*, 41 Misc. 2d 838, 246 N.Y.S. 2d 778; *United States* v. *Montreal Trust Co.*, *supra*. See also *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673. Although the district court's order was issued before the statute became effective, there was still the possibility at that time that Omar might make a general or special appearance. In any event, since service on Omar may *now* be effected under Section 302(a), the district court's order should be sustained so as to enable the government to utilize its presently available remedies.

whether one in Omar's position may enter a special appearance to contest only so much of its liability as involves property within the court's jurisdiction (2 Moore, *Federal Practice,* Par. 12.13, and authorities there cited) there is at least an arguable basis for jurisdiction on this ground should Omar attempt to appear specially. A temporary injunction pending service of process upon the taxpayer is particularly appropriate when, as in the present case (see note 1, *supra*), taxpayer has appeared in the United States Tax Court to contest the very tax liability giving rise to the lien foreclosure action.

C. RESPONDENT CAN BE ENJOINED EVEN THOUGH THE DEPOSIT IS INITIALLY PAYABLE AT ITS MONTEVIDEO BRANCH

The court of appeals was of the view that under New York law respondent's Montevideo branch and its New York home office were "separate entities." Consequently, it concluded that since Omar's deposit was payable at the branch in the first instance, there was "no property subject to attachment within the jurisdiction of the New York courts" (R. 44). Even if the "separate entity" doctrine were deemed to fix the location of respondent's debt to Omar in Montevideo because the deposit is payable there in the first instance, it does not preclude injunctive relief against respondent of the sort granted here by the district court.

In the first place, it is apparently undisputed that respondent has control over its branches and may direct their activities. In this case, as in *First Nat. City*

Bank of N.Y. v. *Internal Revenue Service*, 271 F. 2d 616 (C.A. 2), certiorari denied, 361 U.S. 948, respondent's "actual, practical control" (271 F. 2d at 618) over the allegedly "separate entity" where the debt is initially payable warranted issuance against respondent of the order enjoining any form of transfer of Omar's deposits. For further transfer to or from the Montevideo account could be accomplished by the same process that made the deposit payable in Montevideo—*i.e.*, upon written or oral instructions from the home office. The Second Circuit correctly concluded in *First Nat. City Bank* v. *Internal Revenue Service, supra*, that whatever control can be exercised by a bank's central office over its foreign branches "for any corporate purpose" it may be compelled to exercise, by appropriate order of a district court, in furtherance of a permissible governmental purpose. In the present case, respondent's central office could have "frozen" the funds payable at the Montevideo branch or transferred them elsewhere on Omar's instructions or for some other business purpose. Accordingly, respondent could be compelled by court order to perform the same act in furtherance of the government's attempt to collect the depositor's tax obligation.

Secondly, even if the Montevideo branch is considered a "separate entity" for some purposes, it is obviously nothing more than an arm of respondent for others. The statutory scheme contemplates that the branches and the home office of a national bank constitute a single corporation or banking association.

12 U.S.C. 601, 604. And this Court has said that "[t]axation of a bank's branch is taxation of the bank itself." *Domenech* v. *National City Bank,* 294 U.S. 199, 204. Hence, irrespective of the situs of the debt for purposes of jurisdiction *quasi in rem,* the Montevideo branch should be deemed personally present in the Southern District of New York once respondent's home office is served. The New York decisions which have invoked the "separate entity" doctrine have treated it as a rule applicable for purposes of attachment or to determine "the situs of the debt." *E.g., Cronan* v. *Schilling,* 100 N.Y.S. 2d 474, 476, affirmed, 282 App. Div. 940, 126 N.Y.S. 2d 192; *Bluebird Undergarment Corp.* v. *Gomez,* 139 Misc. 742, 249 N.Y.S. 319. But the doctrine has not been applied by the New York courts as a limitation on a court's jurisdiction *in personam* over a foreign branch.[10] For only if the branch could be separately sued and served under State law could it be considered as a "separate entity" beyond the jurisdiction of

[10] There is a well recognized difference between considering a debt to be present within a jurisdiction for purposes of attachment or other *quasi in rem* proceedings and considering the debtor present for purposes of *in personam* orders. In *Douglass* v. *Phenix Insurance Co.*, 138 N.Y. 209, 219, for example, the New York Court of Appeals held that a debt's situs for attachment purposes was only at the domicile of the creditor or debtor, even though the debtor might obviously be served elsewhere. That decision was subsequently overruled by statute. See *Morris Plan Ind. Bank* v. *Gunning*, 295 N.Y. 324, 329–330. Under *Harris* v. *Balk*, 198 U.S. 215, it is, of course, *permissible* for a State to treat the debt as "following the debtor." But that decision does not *require* a State to do so; nor does it compel such a result for all purposes, once the State has accepted the rule for ordinary attachment or garnishment.

a State court which has obtained personal service on its home office. We have found no New York decision to indicate that the State courts would go so far.

Moreover, even if New York's "separate entity" doctrine were interpreted by the State courts as a requirement that the branch be separately served in order that personal jurisdiction over it be obtained, such a local rule would not govern a federal claim against this federally chartered banking corporation in the federal courts. Compare *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, which involved a diversity action. Rule 17(b) of the Federal Rules of Civil Procedure provides that the capacity of a corporation to sue and be sued "shall be determined by the law under which it was organized." Respondent and its branches are a single corporation organized under a federal statute which authorizes the corporation as a whole—not each office separately—to "sue and be sued." 12 U.S.C. 24. Accordingly, a court which obtains jurisdiction over the home office has before it all the branches as well. Even if the situs of the debt in this case were beyond the district court's jurisdiction, respondent's branch was effectively before the court once its home office was served. Consequently, an *in personam* order could be entered against the entire bank—its foreign branches as well as its home office—restraining it from transferring funds held anywhere for Omar.

As we demonstrate at pp. 32–37, *infra*, there are no substantial policy obstacles to the granting of this relief to the United States. Respondent offered no

proof that the mere "freezing" of the obligation pending service of process on Omar in a federal tax enforcement action would violate foreign law, and the district court reserved the authority to modify the injunction if a satisfactory showing were made in this regard. Indeed, the court of appeals in effect acknowledged that once jurisdiction was perfected by service of process, relief should not be barred by policy considerations. Accordingly, whatever inconvenience exists is limited to the normally brief period between initiation of a tax collection action against a taxpayer with a foreign branch deposit who is amenable to process and the formal service of process on that taxpayer.

II

THE DISTRICT COURT HAD AUTHORITY TO ENTER THE TEMPORARY INJUNCTION TO PRESERVE FUNDS OVER WHICH IT HAD JURISDICTION *QUASI IN REM*

Our alternative contention is that the district court has jurisdiction to enter the temporary injunction because it had jurisdiction ultimately to foreclose the tax lien on respondent's debt to Omar with respect to deposits initially payable at respondent's Montevideo branch. We agree with the court of appeals that the determinative question here is "whether [respondent] holds property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court" (R. 39), but we disagree with the court's conclusion that because of New York's "separate entity" doctrine there is "no property subject to attachment within the jurisdiction of the New York courts"

(R. 44). We urge that respondent's debt to Omar with respect to the Montevideo deposit is "property" within the meaning of the governing provisions of the Internal Revenue Code; that it is "within the district" as required by 28 U.S.C. 1655; and that even if the "separate entity" doctrine would be applied by the New York courts to fix the situs of respondent's debt in Montevideo—an assumption which is not free of doubt—that doctrine does not govern federal tax collection.

A. RESPONDENT'S DEBT TO OMAR INITIALLY PAYABLE IN MONTEVIDEO CONSTITUTES "PROPERTY" WHICH IS "WITHIN THE DISTRICT" UNDER THE APPLICABLE PROVISIONS OF THE INTERNAL REVENUE CODE AND THE STATUTE GOVERNING VENUE

Section 6321 of the Internal Revenue Code (p. 38, *infra*) imposes a tax lien upon "all property and rights to property" of a delinquent taxpayer. Section 7403(a) (pp. 38–39, *infra*) provides that an action may be brought to foreclose this lien "or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of" the tax. Venue in an action to foreclose a federal tax lien is governed by 28 U.S.C. 1655 (pp. 39–40, *infra*) which "provides an exemption from the general venue statute" (Hart & Wechsler, *The Federal Courts and the Federal System*, pp. 954–955) by permitting suit to be brought in any judicial district in which property subject to the lien is located. See, *e.g.*, *United States* v. *Dallas Nat. Bank*, 152 F. 2d 582 (C.A. 5). As the First Circuit recently observed in *Equitable Life Assurance Society of U.S.* v. *United States*, 331 F. 2d 29, 34

(C.A. 1), "any chose of sufficient vitality to support a lien cognizable under section 7403 must equally qualify as property under section 1655." Bank deposits have been held to constitute "property" within the meaning of section 1655. *Omaha Nat. Bank* v. *Federal Reserve Bank,* 26 F. 2d 884 (C.A. 8); *A/S Kredit Pank* v. *Chase Manhattan Bank,* 155 F. Supp. 30, 36 (S.D.N.Y.); cf. *Day* v. *Wilson,* 286 F. 2d 274 (C.A. 10).

It follows that if Omar's deposit were initially payable at respondent's home office in New York City, an action *quasi in rem* to foreclose the tax lien on the debt evidenced by such deposits would be maintainable in the Southern District of New York, notwithstanding failure to obtain personal jurisdiction over Omar. The fact that the debt is initially payable by respondent at its branch in Montevideo does not affect the status of respondent's debt to Omar as "property" or "rights to property" of a taxpayer within the meaning of the applicable lien provisions of the Internal Revenue Code, since those provisions include no territorial restriction. And we submit that apart from New York's "separate entity" doctrine—which we believe to be inapplicable for reasons stated below (pp. 28–32, *infra*)—respondent's undertaking to pay the deposit in Montevideo did not remove the situs of the respondent's debt to Omar from New York for purposes of the federal tax lien law and 28 U.S.C. 1655, which may be availed of only with respect to "property within the district."

As has been demonstrated above (pp. 19–22, *supra*), the Montevideo branch and the home office—along

with all other foreign branches—add up to a single corporate body. The corporation is in New York; indeed, all of its component parts are controlled from the home office in New York. Laying aside for the moment the "separate entity" doctrine of New York's banking law (which we discuss at pp. 28–32, *infra*), it hardly seems questionable that if a foreign office of an ordinary business corporation were to incur a legitimate corporate debt, the obligation would be enforceable in the jurisdiction of the corporation's main office after service upon that office. The corporation could *not* claim that its foreign office—which has no separate legal existence—is the sole debtor and that the debt's situs is where the office is located. The only legally cognizable debtor in such a case would be the whole corporation, and it could obviously be "found" where its main office is located. Cf. *Varga* v. *Credit-Suisse*, 2 App. Div. 2d 596, 157 N.Y.S. 2d 391. If this principle is applied to the present case, Omar's "debtor" can only be said to be respondent—its home office together with all its branches—since all its components constitute one corporate body. The most that can be said in support of respondent's position is that the single corporation has become obliged to pay the debt in a jurisdiction other than where its home office is located. But this obligation does not alter the situs of the debt for purposes of jurisdiction *quasi in rem*.

In *Harris* v. *Balk*, 198 U.S. 215, this Court sustained the jurisdiction of a State court to attach or garnish a debt and proceed to a judgment *quasi in rem* binding on the creditor by obtaining jurisdiction

over such creditor's debtor. Although the Court reached its conclusion in *Harris* v. *Balk* on the premise that the garnishee's creditor (*i.e.*, the plaintiff's debtor) could sue the garnishee on the debt in the jurisdiction where garnishment was sought, that fact was not considered determinative in later cases following *Harris* v. *Balk*. See *The Copperfield*, 7 F. 2d 499 (S.D. Ala.), affirmed, *sub nom. Aktieselskabet Dea* v. *Wrightson*, 26 F. 2d 175 (C.A. 5), certiorari denied, 278 U.S. 623; *Schlaefer* v. *Schlaefer*, 112 F. 2d 177, 182–183 (C.A. D.C.) (dictum). And State courts have generally permitted garnishment of debts which are payable only outside the jurisdiction[11] even if the creditor is obliged to demand payment at a specified place before bringing suit within the jurisdiction.[12] Hence it appears that a court's power to proceed *quasi in rem* against a debt owed by a person or other legal entity over whom it has jurisdiction is not affected by the fact

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[11] See *Pierce* v. *Pierce*, 153 Ore. 248, 56 P. 2d 336; *Farrar* v. *American Express Co.*, 219 S.W. 989; *Morrison* v. *Illinois Central R. Co.*, 101 Neb. 49, 161 N.W. 1032; *Shuttleworth & Co.* v. *Marx & Co.*, 159 Ala. 416, 49 So. 83; *Steer* v. *Dow*, 75 N.H. 95, 71 Atl. 217; *Harvey* v. *Thompson*, 128 Ga. 147, 57 S.E. 104; *Baltimore & Ohio R. Co.* v. *Allen*, 58 W. Va. 388, 52 S.E. 465; see also *Cross* v. *Brown, Steese & Clarke*, 19 R.I. 220, 33 Atl. 147, affirmed *sub nom. King* v. *Cross*, 175 U.S. 396.

[12] See *Grant County Service Bureau, Inc.* v. *Treweek*, 19 Wis. 2d 548, 554, 120 N.W. 2d 634, 638–639 (dictum); *Godfrey Coal Co.* v. *Gray*, 296 Mass. 323, 5 N.E. 2d 556; *Steer* v. *Dow*, *supra*; *Graf* v. *Wilson*, 62 Ore. 476, 125 Pac. 1005; *Baltimore & Ohio R. Co.* v. *Allen*, *supra*; but cf. *Commercial Nat. Bank of Chicago* v. *Chicago, M & St. P.R. Co.*, 45 Wis. 172; *Morphet* v. *Morphet*, 19 Ill. App. 2d 304.

that the debt is payable only outside the court's jurisdiction. To hold otherwise would be to accept the contention rejected in *Schlaefer* v. *Schlaefer,* 112 F. 2d at 182, "that the debt has an exclusive situs at the place designated for payment, similar to that of real estate or to that commonly attributed to tangible personalty for taxation and other purposes." Such a holding would have the effect of permitting the parties to a debt to immunize their obligation from attachment or garnishment by specifying a particular location for payment, thereby frustrating the objective of decisions such as *Harris* v. *Balk* which were intended "to extend rather than to restrict the enforceability of the debt." *Ibid.*

Consequently, the debt owed by respondent to Omar, although assumed to be payable in the first instance only in Montevideo, is "property" and a right to property within the meaning of the Internal Revenue Code and therefore could be brought under the court's jurisdiction in an appropriate action *quasi in rem* in any district in which the respondent could be served. Section 1655 authorizes district courts to assume jurisdiction *quasi in rem* in tax lien foreclosure cases when such jurisdiction is warranted. The present case involved a permissible exercise of that authority.

B. NEW YORK'S "SEPARATE ENTITY" DOCTRINE DID NOT PRECLUDE THE DISTRICT COURT'S EXERCISE OF JURISDICTION OVER THE DEBT SINCE THAT DOCTRINE DOES NOT GOVERN IN THIS FEDERAL TAX-COLLECTION PROCEEDING

The court of appeals was of the view that the district court could not obtain jurisdiction *quasi in rem* over the debt created by Omar's account in Montevi-

deo because of "a consistent line of [New York] authority holding that accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank" (R. 41). We submit that this conclusion was erroneous because even if New York's "separate entity" doctrine would be applied by the State courts to bar attachment or garnishment in a suit between private parties in a situation such as the one presented here,[13]

[13] There is a distinguishing feature between the factual situation here and those in the New York decisions applying the "separate entity" doctrine in the bank's favor. In the present case, unlike *Bluebird Undergarment Corp.* v. *Gomez*, 139 Misc. 742, 249 N.Y.S. 319, and *Clinton Trust Co.* v. *Compania Azucarera Central Mabay S.A.*, 172 Misc. 148, 14 N.Y.S. 2d 743, affirmed, 258 App. Div. 780, 15 N.Y.S. 2d 721, it affirmatively appears in the record that respondent's central office participated in the transfer of the funds to the foreign branch. The New York doctrine appears to be based on the "intolerable burden" (*Cronan* v. *Schilling*, 100 N.Y.S. 2d 474, 476, affirmed, 282 App. Div. 940, 126 N.Y.S. 2d 192) or "crippling effect" (*Newtown Jackson Co.* v. *Animashaun*, 148 N.Y.S. 2d 66, 68) which would be imposed on banks if they were required to notify all branches of any writs of attachment or garnishment that had been served upon them. It might well be sufficiently less burdensome today for a central office to notify the one branch to which it had transferred funds that attachment proceedings were pending to warrant a different result when, as here, the central office has sent the funds to the branch in the first instance. The result in *Sokoloff* v. *National City Bank*, 130 Misc. 66, 224 N.Y.S. 102, affirmed, 223 App. Div. 754, 227 N.Y.S. 907, affirmed, 250 N.Y. 69, 164 N.E. 745, where the central office did participate in the transfer to the foreign branch, is not inconsistent with this suggested distinction since the court in *Sokoloff* concluded that the deposit could be reached on other grounds. Consequently, it is possible that even the New York courts would not find it necessary to extend the "separate entity" doctrine to cover the present factual situation.

this local rule should not control in a federal tax-collection proceeding.

It is true that a federal tax lien can reach only such property as the taxpayer has or is entitled to under State law. *United States* v. *Bess*, 357 U.S. 51, 55; *Aquilino* v. *United States*, 363 U.S. 509. But that rule does not mean that the government may be prevented from reaching certain property rights merely because the taxpayer has not yet elected to exercise them. Although a taxpayer may secure the cash surrender value of a life insurance policy only after filing a formal notice of election and surrendering the policy, the government's tax lien attaches to, and may be enforced against, the cash surrender value of the policy notwithstanding the taxpayer's refusal to make the election. *Equitable Life Assurance Society of U.S.* v. *United States*, 331 F. 2d 29 (C.A. 1); *United States* v. *Metropolitan Life Insurance Co.*, 256 F. 2d 17 (C.A. 4). But see *United States* v. *Metropolitan Life Insurance Co.*, 130 F. 2d 149 (C.A. 2). Similarly, the fact that a taxpayer may not secure the corpus of a trust without formally revoking the trust does not mean that a tax lien will reach the trust property only upon compliance with this condition by the government or the taxpayer. *United States* v. *Peelle*, 159 F. Supp. 45 (E.D. N.Y.).[14] The

[14] Similar to these are other cases in which it was held that formal acts which must be performed by taxpayers need not be done by the government before a tax lien attaches. See *United States* v. *Bowery Savings Bank*, 297 F. 2d 380 (C.A. 2); *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366 (C.A. 2); *United States* v. *Emigrant Industrial Sav. Bank*, 122 F. Supp. 547 (S.D. N.Y.); *United States* v. *Buia*, 144 F. Supp. 477 (S.D. N.Y.) (presentation of a passbook for a bank

reason for the rule was explained by the Fourth Circuit in *United States* v. *Metropolitan Life Insurance Co.*, 256 F. 2d 17, 25, as follows:

> When, however, they [the insurance policies] are unavailable for surrender, because the owner has absconded to a foreign country and is beyond the reach of personal process, and when the interest of the insurer will be protected by the judgment of the court, the insurer should be required to pay the cash surrender value in the proceeding under the statute. * * * we "see no reason to uphold a taxpayer who admits he has an interest in property but flauntingly says it is beyond the reach of the Government." To which we may add that the court is not so impotent that it cannot apply to the satisfaction of fax liens property interests of a taxpayer held by corporations within its jurisdiction.

In the present case it is obvious that Omar has the actual power to control the location at which payment is to be made by respondent; the bank will doubtless pay the deposit at any branch designated by Omar. In effect, Omar is admitting that it "has an interest in property but flauntingly says it is beyond the reach of the Government" by reason of New York's "separate entity" rule.[15] In this situa-

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deposit). See also *United States* v. *Schuermann*, 106 F. Supp. 86 (E.D. Mo.); *United States* v. *Caldwell*, 74 F. Supp. 114 (M.D. Tenn.) (surrender of a negotiable instrument).

[15] It is no answer to this argument to say that the debt in the present case—unlike those in the life insurance and trust cases—is payable in the first instance in a foreign jurisdiction. As has been noted above, pp. 24–28, *supra*, the location at which the debt is payable is no limitation on the court's jurisdiction *quasi in rem*.

tion, as in the related ones where the question is whether taxpayer can be said to have received income, the critical question is whether the taxpayer has "actual command over the property," *Corliss* v. *Bowers*, 281 U.S. 376, 378, and whether this command may, at his election, make the property payable within the district court's jurisdiction. If this test is met, and if, in addition, the court has jurisdiction over the debtor—particularly if the debtor's home office is within the district—the taxpayer should be considered, for federal tax-collection purposes, as holding that property (or the rights thereto) within the district irrespective of State law.

III

NO REASONS OF POLICY WARRANT DENIAL OF THE TEMPORARY INJUNCTION

The court of appeals relied, to some extent, on respondent's contention that sound public policy demanded that the relief requested by the government be denied (R. 48–49.) However, an analysis of the policy grounds relied upon by respondent in this Court and those adopted by the court of appeals discloses that none of the asserted reasons justifies withholding the relief which the government seeks.

A. THE PROSPECT OF MULTIPLE LIABILITY IS REMOTE AND SHOULD NOT, IN ANY EVENT, BAR RELIEF

Respondent argues that no order of the district court could relieve it "from the consequences of its conduct in the foreign country" and that this leaves

it open "to multiple liability" (Br. in Op. 6). This contention overlooks several important considerations.

First, the district court's opinion expressly reserved authority to modify its order if respondent presented "proof" that compliance with the order "would violate local law" (R. 28). As the court observed, respondent alleged that the "freezing" of the foreign deposits would violate foreign law, but it failed entirely to come forward with supporting proof.

Second, in the absence of proof that the mere "freezing" of the assets would cause respondent to violate Uruguayan law, it is apparent that respondent's fear of multiple liability is entirely premature. If it complies with the district court's order, respondent is, on this hypothesis, engaging in no unlawful activity and will presumably incur no liability.[16]

Third, even if respondent is ultimately required to transfer the funds on deposit to the United States, such an order would, under our first contention (pp. 10–23, *supra*), follow valid service of process on Omar. If Omar were then required to make the de-

[16] The possibility that an action might be brought in the foreign jurisdiction for slander of credit if respondent, in compliance with the order, refuses to release the funds on deposit, presupposes that respondent has a legal obligation in that jurisdiction to permit withdrawal of the funds notwithstanding the order of a United States District Court. Respondent's failure to prove that "freezing" of the assets would result in "a violation of foreign law" indicates—in the absence of evidence to the contrary—that the foreign jurisdiction would accept the generally recognized defense to such an action that an outstanding court order prohibited payment on the depositor's account. See Comment, *Bank Responsibility to Third Party Claimant Against Depositor's Account*, 30 Marq. L. Rev. 54, 61 (1946).

posit available to meet its tax obligation, it is unlikely that it could subsequently attack a transfer taking place in accordance with any such judgment in a suit brought by it against respondent in a foreign jurisdiction to collect the amount of the deposit. Having been personally present in the Southern District of New York and having been compelled to transfer the deposit by an order of that court, Omar would be bound by that transfer in a foreign jurisdiction. See *Naamloze Vennootschap* v. *Chase Nat. Bank*, 111 F. Supp. 833 (S.D.N.Y.); cf. *Phillips* v. *Phillips*, 224 Ark. 225, 272 S.W. 2d 433; *Deschenes* v. *Tallman*, 248 N.Y. 33, 161 N.E. 321.[17]

Fourth, if jurisdiction *quasi in rem* is sustained and the court forecloses on the government's tax lien, the prospect of double liability in this case is not substantially greater than it would be in any case in which a garnishee may be sued in a foreign jurisdiction—even if the garnisheed debt is collectible in the United States and clearly has a situs here. Consequently, if the possibility of multiple liability were a defense to tax lien foreclosures such as this one, it should also be a defense when the debt indisputably has a situs within the United States. Indeed, the possibility of double liability arises in purely domestic

[17] Even a foreign court which would not enforce an unexecuted United States judgment arising out of a tax claim, see, *e.g.*, *United States of America* v. *Harden*, Supreme Court of Canada, October 2, 1963, 63-2 U.S.T.C. ¶9768, would recognize a transfer of property "fully executed" under U.S. law pursuant to such a judgment. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 414.

garnishment proceedings as well,[18] and it is no defense in such situations.

B. THE POSSIBLE EFFECT ON THE ATTRACTIVENESS OF AMERICAN BRANCH BANKS TO FOREIGN DEPOSITORS IS NO REASON TO DENY RELIEF

The court of appeals was apparently concerned over the possibility that an order such as the one granted by the district court would be injurious to American branch banking (R. 48–49). We submit that the injury is minimal, if not nonexistent.

1. The possibility that the "artful tax dodger" (R. 48) will avoid American banks is entirely consistent with Congress' purpose in authorizing foreign branch banking. In enacting recent legislation authorizing the expansion of foreign branch banking by national banks, 76 Stat. 388, Congress explicitly manifested an intention to prevent these facilities from being used by tax evaders. The House committee report states:

> The committee wishes to make clear * * * that it does not believe nor intend that this legislation should offer any opportunity for tax evasion. Additionally the committee requests that in the implementation of this legislation by regulation that every effort be made to guard against the creation of any such opportunities.[19]

2. Nor is the law-abiding foreign depositor likely to be dissuaded from using American branch banks. In the first place, his deposited funds could be "frozen" under our primary contention (pp. 10–23, *supra*)

[18] See, *e.g.*, *Karp* v. *First National Bank*, 295 Mass. 365, 3 N.E. 2d 733; *Riley* v. *State Bank of De Pere*, 223 Wis. 16, 269 N.W. 722. See generally Note, *Double Liability of Garnishees Resulting From Failure of Jurisdiction*, 48 Yale L. J. 690 (1939); Annot., 49 A.L.R. 1411, 166 A.L.R. 272.

[19] H. Rep. No. 2047, 87th Cong., 2d Sess., p. 2.

only if there were a reasonable possibility that he could be lawfully served with process in the United States—in which event any property belonging to him in any bank, American or foreign, could be reached by an order *in personam*. Most important, the Treasury Department has recently issued a regulation (Appendix, pp. 41–43, *infra*) which limits the power of the Internal Revenue Service to institute judicial proceedings to reach foreign branch deposits to situations in which, as here, either "the taxpayer is within the jurisdiction of a United States court" or the "deposits consist, in whole or in part, of funds transferred from the United States * * * in order to hinder or delay the collection of a tax imposed by the Code." Consequently, the foreigner who deposits directly in a foreign branch of a United States bank or who has not transferred deposits from the United States to a branch to hinder or delay tax collection need not fear that his bank accounts will be "frozen" because of some tax claim by the United States.

3. Our second contention (pp. 23–32, *supra*) turns on the proposition that the district court has jurisdiction *quasi in rem* because this is a federal tax-collection action. Accordingly, potential foreign depositors in American branch banks would have no cause to apprehend that private citizens would use garnishment proceedings in courts of the United States to reach the deposits of foreign corporations which are not amenable to service of process in the United States. For unless, under our first argument, there is a reasonable possibility that the foreign corporation can be served in the district, the "separate

entity" doctrine would prevent any such private action.

4. Finally, the recent Treasury regulation also provides that routine tax liens will not affect foreign branch deposits. Only when "the notice of levy specifies that the district director intends to reach such deposits" will they be subjected to a tax levy. Thus the banks will be put clearly on notice in the few cases where a levy is intended to reach deposits transferred from the United States to frustrate tax collection, and only after such notice will they be obliged to inform their branches of the levy.

In sum, the possible effect on branch banking does not justify denial of the relief afforded by the district court's temporary injunction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7402.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, or to

discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7403.)

28 U.S.C.:

SEC. 1655. LIEN ENFORCEMENT; ABSENT DEFENDANTS.

In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the property is within another district, but within the same state, such action may be brought in either district.

Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just.

New York Civil Practice Law and Rules, 7B McKinney's Consolidated Laws of New York, Annotated:

SEC. 302. PERSONAL JURISDICTION BY ACTS OF NON-DOMICILIARIES

(a) *Acts which are the basis of jurisdiction.* A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. owns, uses or possesses any real property situated within the state.

(b) *Effect of appearance.* Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

SEC. 313. SERVICE WITHOUT THE STATE GIVING PERSONAL JURISDICTION

A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made

or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction.

Treasury Regulations on Procedure and Administration (1954 Code):

SEC. 301.6332–1 [as amended by T.D. 6746]
Surrender of property to levy.

(a) *Requirement*—(1) *In general.* Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the district director, surrender such property or rights (or discharge such obligation) to the district director, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(2) *Property held by banks.* Notwithstanding subparagraph (1) of this paragraph, if a levy has been made upon property or rights to property subject to levy which a bank engaged in the banking business in the United States or a possession of the United States is in possession of (or obligated with respect to), the Commissioner shall not enforce the levy with respect to any deposits held in an office of the bank outside the United States or a possession of the United States, unless the notice of levy specifies that the district director intends to reach such deposits. The notice of levy shall not specify that the district director intends to reach such deposits unless the district director believes—

(i) That the taxpayer is within the jurisdiction of a United States court at the time the levy is made and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office of the bank outside the United States or a possession of the United States; or

(ii) That the taxpayer is not within the jurisdiction of a United States court at the time the levy is made, that the bank is in possession

of (or obligated with respect to) deposits of the taxpayer in an office outside the United States, or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code. For purposes of this subparagraph the term "possession of the United States" includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

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(26 C.F.R., Sec. 301.6332–1.)

Sec. 301.7401–1 [as amended by T.D. 6746, *supra*] *Authorization.*

(a) *In general.* No civil action for the collection or recovery of taxes, or of any fine, penalty, or forefeiture, shall be commenced unless the Commissioner (or the Director, Alcohol and Tobacco Tax Division, with respect to the provisions of subtitle E of the Code) authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced. With respect to forfeitures, the assistant regional commissioner or supervisor in charge (alcohol and tobacco tax) may also authorize or sanction the proceedings.

(b) *Property held by banks.* The Commissioner shall not authorize or sanction any civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, from any deposits held in a foreign office of a bank engaged in the banking business in the United States or a possession of the United States unless the Commissioner believes—

(1) That the taxpayer is within the jurisdiction of a United States court at the time the civil action is authorized or sanctioned and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office

of the bank outside the United States or a possession of the United States; or

(2) That the taxpayer is not within the jurisdiction of a United States court at the time the the civil action is authorized or sanctioned, that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office outside the United States or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code.

For purposes of this paragraph, the term "possession of the United States" includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

(26 C.F.R., Sec. 301.7401–1.)

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